APPEAL NO. 92109
FILED MAY 4, 1992

On February 18, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. Because there are numerous parties and employers involved, a brief description of the parties is made for purposes of clarity.

The claimant (claimant/respondent) was hired by a temporary labor service (Temp) whose workers compensation insurance carrier was (Respondent X). Temp entered into an agreement with (Food Co.) to provide laborers to work at its meat cutting plant, and claimant/respondent was one employee provided to Food Co. under this agreement. Food Co. was insured for workers' compensation by (appellant). In February 1991, a month after the onset of the alleged injury, claimant/respondent was terminated by Food Co. and Temp, and went to work for (Wash Co.), whose workers' compensation insurance carrier was (Respondent Z).

(Hearing officer) determined that the claimant/respondent sustained a compensable injury on (date of injury), while working under the direction and control, and as an employee of, Food Co., and held that appellant was liable for compensation. As part of his decision, the hearing officer further found that both appellant and Respondent X had failed to timely dispute compensability of the injury, did not have good cause for not timely contesting compensability, and had therefore waived the right to contest compensability.

The hearing officer's decision was issued March 3, 1992, by the Hearings & Review Division of the Texas Workers' Compensation Commission (Commission).

On March 18, 1992, appellant filed a timely appeal of the decision on the sole ground that the hearing officer erred by not giving effect to a written stipulation between it and Respondent X to the effect that the claimant/respondent's employer was Temp, rather than Food Co. On April 1, 1992, Respondent X filed a "response" to this appeal; however, the response seeks a reversal of the hearing officer's determination on grounds not related to the stipulation, argues that Wash Co. was the employer, and further that Respondent Z is the liable carrier for purposes of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.01 (Vernon's Supp. 1992) ("1989 Act").

On April 6th, Respondent Z filed a response that is directed at Respondent X's response, and not at the appeal. It argues that Respondent X did not file a timely appeal and has therefore waived its points of eror and requested relief and further notes that Respondent X waived its right to contest compensability (and in effect agrees that the hearing officer's decision on this point was correct). Respondent Z further states that the decision of the hearing officer is correct insofar as it finds that the claimant/respondent sustained a compensable injury while working at Food Co., and not for Wash Co. Claimant/respondent has not filed a response to the appeal or any other response.

DECISION

Finding that the hearing officer erred in not giving effect to the stipulation entered into the record, and not objected to, between the carriers for Food Co. and Temp, we reverse the determination that Food Co. was the employer of claimant/respondent at the time of the injury and that appellant is liable for benefits, and render the decision that claimant/respondent sustained an injury in the course and scope of her employment with Temp, and find that Respondent X is liable for payment of benefits to claimant/respondent. No other matters being timely appealed, the hearing officer's decision is therefore affirmed in every other respect.

Briefly, the claimant/respondent was hired by Temp and sent out on assignment to work for Food Co. shortly before Thanksgiving, 1990. She worked as a meat cutter on a line, with which she stated she had to keep up. She used a pizza cutter utensil. Claimant/respondent developed what was later diagnosed as carpal tunnel syndrome. She stated that she notified her supervisor at Food Co. about the pain and cramping in her hands on (date of injury). Although she had applied to Food Co. to become a permanent employee, she says she was told by them in late January that her services were no longer needed because she had used up her "hours" and that she was always complaining about her hands. She subsequently went to work for Wash Co. on a part-time, sporadic basis where she performed final inspection and wiping of cars that had been cleaned. Her hands continued to hurt, although she testified that the nature of the work was quite different from what she did at Food Co. and her hands did not hurt as much as they had at Food Co. Claimant/respondent filed a claim for compensation identifying Temp as her employer. Her recorded statement given to an adjuster for Respondent X also identified Temp as her employer.

Claimant/respondent's paycheck and withholding were handled by Temp. Ms. V, employment manager of Food Co., testified that her company had a written contract with Temp to provide additional laborers, that Temp carried workers' compensation insurance for those employees and that Food Co. did not, and that day-to-day supervision and instruction of claimant/appellant was conducted by supervisors who worked for Food Co. Ms. V stated that on-the-job injuries that occurred involving employees of Temp were reported to Food Co., who would then instruct those employees to report to Temp. The Food Co. file on claimant/respondent did not reflect the reporting of an injury in December 1990, or January or February of 1991. However, Ms. V conceded that only a nurse could make entries to the file, and that the supervisors to whom claimant/respondent contended she reported her hand pains could not make entries. Ms. M, as employee of Temp, stated that claimant/ respondent had reported a hand condition to her on February 20, 1991.

The sole issue left unresolved after the benefit review conference was "[W]hich insurance company is liable?" The position of claimant/respondent was that she was entitled to benefits "from some source." The position of Appellant was that Respondent X was liable. Respondent X's position was that Respondent Z was liable, and it did not assert liability of appellant. At the hearing, Appellant and Respondent X tendered into the record

the following written stipulation:

"That at any time the Claimant, [name], was engaged in any activities on the premises of [Food Co.], or otherwise on behalf of [Food Co.], the claimant was on any such occasion engaged in the course and scope of employ- ment for [Temp], and was not engaged in the course and scope of employ- ment for [Food Co.], or any individual or entity associated with [Food Co.]."

Neither claimant/respondent nor Respondent Z joined in this stipulation; however, neither objected to its admission into the record. After Ms. V testified that persons who were employed by Food Co. supervised claimant/respondent's work, the hearing officer asked attorney for Respondent X if it wished to reconsider its stipulation. The attorney for Respondent X answered: "The stipulation stands."

Appellant argues that the hearing officer should not have ignored the stipulation and imposed the "borrowed servant" doctrine in its place in light of the fact that there was no dispute from claimant/respondent over who her employer was. The appellant points to the 1989 Act, Art. 8308-6.34(e), stating that a written stipulation entered into the record is final and binding. Given the facts of this case, we agree.

A stipulation is an agreement, a concession made by parties respecting some matter incident to a judicial proceeding. National Union Fire Insurance Co. v. Martinez, 800 S.W.2d 331 (Tex. App.-El Paso 1990, no writ). They are generally received as judicial admissions in the absence of allegations and proof of fraud, mistake, or lack of authority. Thompson v. Graham, 318 S.W.2d 102 (Tex. Civ. App.-Eastland 1958, writ ref'd n.r.e.). Parties cannot stipulate to legal conclusions to be drawn from the facts of a case; such stipulations are without effect and bind neither the parties nor the courts. City of Houston v. Deshotel, 585 S.W.2d 846 (Tex. Civ. App.-Houston [1st Dist.] 1979, no writ).

However, parties may agree on truth of specific facts by stipulation and by this method limit the issue to be tried. Geo-Western Petroleum Development Inc. v. Mitchell, 717 S.W.2d 734 (Tex. App.-Waco 1986, no writ). Such stipulations are binding on the parties, on the trial court, and the appeals court. Id. Evidence conflicting with an agreed stipulation is generally not admissible until the contrary stipulation is nullified by consent or order of the court. Allen v. Allen, 704 S.W.2d 600, 605 (Tex. App.-Fort Worth 1986, no writ); Wilson v. West, 149 S.W.2d 1026 (Tex. Civ. App.-San Antonio 1941, writ dism'd judgm't. corr.). In multi-party lawsuits, stipulations may be made between only some parties; however, such stipulations do not bind parties who have not joined them. Bishop v. Sanford, 35 S.W.2d 800 (Tex. Civ. App.-Amarillo 1931, writ ref'd). Disregarding a proper stipulation can be the basis for reversible error. *See* Jeter v. Radcliff Finance Corp., 247 S.W.2d 186 (Tex. Civ. App.-Galveston 1952, no writ).

Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 140.1 defines stipulation as a "voluntary accord between parties to a benefit contested case hearing regarding any matter

relating to the hearing that does not constitute an agreement . . . or a settlement . . . ."

The definitions of agreement and settlement contained in Art. 8308-1.03(3) and (43) indicate that those matters have to do with resolving "issues." In this matter, two potentially liable carriers agreed that, if an injury were found to have resulted at the Food Co. location rather than Wash Co., that Respondent X would accept liability for the claim as opposed to Appellant. Scrutiny of the benefit review conference report, as well as other evidence from claimant/respondent that identifies Temp as her employer, indicates that there was never an "issue" between appellant and respondent X as to whether Temp or Food Co. was the employer. Food Co. argued that Temp was, but, from its part, Temp never argued that Food Co. was the employer, and argued only that, for purposes of a claim of occupational disease, it was Wash that was the employer at the time of last injurious exposure to the hazards of the disease. Consequently, the aspect of whose "course and scope" was served by claimant/respondent's activities, as between Temp and Food Co., was a matter that could be the subject of stipulation, and was not an "agreement" as that term is used in the 1989 Act and Rules.

It should be noted that the evidence which ostensibly comprised the basis for the hearing officer's determination that claimant/respondent was an employee of Food Co. was all brought forward by the hearing officer. However, the hearing officer did not ask questions concerning retention of the "right of control" by Food Co. or Temp, but only elicited facts that indicated that Food Co merely exercised control. Although the hearing officer found that there was no evidence of a written agreement between Temp and Food Co. concerning the right of control, we would note that Food Co.'s witness, Ms. V, testified that Food Co. and Temp had a written agreement covering their arrangement. Because the stipulation at that point had been entered into evidence, it could be reasonably surmised that neither appellant nor Respondent X felt it necessary to include that agreement or its terms in the record based upon an understanding that the facts were resolved by stipulation. It could also be inferred that the stipulation may reflect the written agreement between Temp and Food Co. The right of control of a servant is usually a question of fact. Sparger v. Worley Hospital Inc., 547 S.W.2d 582 (Tex. 1977). As between Temp and Food Co. (either of whom shared indicia of employment over claimant/respondent on (date of injury), and could therefore have been found liable for benefits), the facts of employment as between these companies were worked out, and were not therefore before the hearing officer to decide. We find no reason, under the circumstances of this case, to look behind the stipulation. We would also note that although the claimant/respondent is not "bound" by an unjoined stipulation, the stipulation here does not deprive her of rights or benefits due under the law.

This is the only issue before the appeals panel. As Respondent Z has properly pointed out, Respondent X failed to timely file an appeal. Although the Appeals Panel is required to consider a "response" filed with it, Art. 8308-6.42, we hold that a party cannot simply label new grounds of attack on a decision (unless raised in the appeal) a "response" and circumvent the filing requirements set forth in Art. 8308-6.41. In this case, by operation

of Rules 102.3, 102.5(h) and 143.3(c), Respondent X was required to appeal disputed portions of the hearing decision by mailing its appeal no later than March 23rd, to be received by the Commission not later than March 30th. *See also* Texas Workers' Compensation Commission Appeals Panel Decision No. 92036 (Docket No. HO/91-103472/01-CC-HO41) decided March 11, 1992. Because its response injects new requests for relief and not merely in response to the issues in the appeal and seeks reversal and entry of an order against Respondent Z, its claims for relief are denied as untimely.

The hearing officer's findings of fact and conclusions of law that find that Food Co., rather than Temp, was the employer for purposes of payment of benefits are reversed, as well as his decision holding (appellant) liable for benefits, and we render an order, in accordance with the stipulation entered in the record, that the employer of claimant/respondent on (date of injury), which the hearing officer found to be her date of injury, was Temp and that its insurance carrier, Respondent X is liable for payment of benefits which may be due to appellant under the Texas Workers' Compensation Act.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge